

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDITH M. PICKENS)	
Claimant)	
VS.)	
)	
)	Docket Nos. 1,027,012;
)	1,027,013; & 1,027,015
ARROW MERCHANDISING, INC.,)	
MERCHANDISING CONCEPTS GROUP, INC.,)	
& LANTIS ACQUISITION CORP.)	
Respondents)	
AND)	
)	
ZURICH NORTH AMERICA,)	
EMPLOYERS INSURANCE OF WAUSAU,)	
& INSURANCE COMPANY UNKNOWN)	
Insurance Carriers)	

ORDER

Administrative Law Judge John D. Clark consolidated the above three docketed claims for the March 7, 2006, preliminary hearing. One of the three respondents, Merchandising Concepts Group, Inc. (MCG), and its insurance carrier, Employers Insurance of Wausau (Wausau), appealed the March 7, 2006, preliminary hearing Order entered by the Judge.

ISSUES

Claimant developed bilateral upper extremity symptoms while performing similar work for MCG, Lantis Acquisition Corp. (Lantis), and Arrow Merchandising, Inc. (Arrow). Claimant alleges she sustained repetitive trauma injuries to both upper extremities from November 2005 and each day worked thereafter.

In the March 7, 2006, preliminary hearing Order, Judge Clark found claimant was an employee of all three companies and that she performed identical work for each. As claimant was continuing to work for Lantis, the Judge ordered Arrow to pay 62 percent and MCG to pay 38 percent of claimant's temporary partial disability benefits. The Judge also authorized Dr. Darla Rivera to treat claimant with the three companies to pay an equal share.

MCG and its insurance carrier, Wausau, contend Judge Clark erred. They argue claimant was employed by MCG as an independent contractor and, therefore, MCG should not be responsible under the Workers Compensation Act for claimant's injuries. Accordingly, MCG and Wausau request the Board to modify the March 7, 2006, Order.

Conversely, claimant contends the preliminary hearing Order should be affirmed.

The only issue before the Board on this appeal is whether claimant worked for MCG as an independent contractor or whether she was an employee for purposes of the Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes the preliminary hearing Order should be affirmed.

During the fall and winter of 2005, claimant developed progressively worsening symptoms in her upper extremities. During that period, claimant worked as a retail merchandiser for the three respondents named in these docketed claims. That job required claimant to stock merchandise, clean up merchandise displays, change displays, put out new merchandise and pull damaged merchandise from the displays.

The present record contains only one medical opinion regarding the cause of claimant's upper extremity problems. Dr. Darla Rivera, whom claimant has consulted for her symptoms, has diagnosed claimant as having bilateral carpal tunnel syndrome that is related to her work as a merchandiser.

It is often difficult to determine in a given situation whether a person is an employee or independent contractor since there are elements pertaining to both relationships that may occur without being determinative.¹ And there is no absolute rule for determining whether an individual is an independent contractor or an employee.² Instead, the parties' relationship depends upon all the facts and the label that they choose to employ is only one of those facts. In short, the terminology used by the parties is not binding.³

¹ *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

² *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

³ *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

The primary test used in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed. But it is not the actual interference or exercise of control by the employer that renders one a servant rather than an independent contractor. Rather, it is the existence of the right or authority to interfere or control that is significant.⁴

Other factors that are commonly recognized as indicating an independent contractor relationship are: (1) the existence of a contract to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) the employment of assistants and the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right to control the progress of the work; (6) the length of time that the worker is employed; (7) whether the worker is paid by time or by the job; and (8) whether the work is part of the regular business of the employer.⁵

Based upon the following factors, the Board affirms the Judge's conclusion that claimant worked for MCG as an employee for purposes of the Workers Compensation Act. First and foremost, the work claimant performed for MCG was a regular part of its business. MCG contracted with other companies to display their merchandise in various retail stores. And MCG then instructed claimant in detail how to display the merchandise. Second, the relationship between MCG and claimant was ongoing in nature. At the time of the preliminary hearing, claimant had worked for MCG approximately three and one-half years. Third, as indicated above, MCG provided claimant with detailed instructions as to how the merchandise would be displayed. And finally, MCG provided claimant with all the merchandise, displays, designs, and other necessary items to stock the merchandise as instructed.

The Board is cognizant the following factors tended to establish claimant was an independent contractor: claimant was able to set her own schedule as she was given a deadline in which to perform the assigned task; claimant was able to decline an assignment and also able to take time off whenever she desired; MCG paid claimant a set sum based upon the time it estimated would be required to perform the designated tasks; MCG did not exercise close supervision over claimant's work; claimant was responsible for her own transportation and she was not reimbursed those expenses; it appears the parties entered into a contract that provided claimant would be an independent contractor; and

⁴ *Wallis*, 236 Kan. at 102-103.

⁵ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

MCG did not withhold any taxes from claimant's checks. Nonetheless, the Board is persuaded at this juncture that claimant was an employee of MCG for purposes of the Workers Compensation Act.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁶

The Board adopts the findings and conclusions set forth in the preliminary hearing Order.

WHEREFORE, the Board affirms the March 7, 2006, Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of May, 2006.

BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
Kendall R. Cunningham, Attorney for Arrow and Zurich North America
Douglas C. Hobbs, Attorney for MCG and Wausau
Lantis Acquisition Corp., 301 State Rt. 17, 9th Floor, Rutherford, NJ 07070
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁶ K.S.A. 44-534a(a)(2).